which take the view that the laborer has the right to quit work in concert with others, just as well as singly, for any reason he sees fit, so long as there is an absence of actual malice.[12] On this reasoning it would seem that the "closed shop" extended over an entire community or industry would be a legitimate object of a strike. From this it would follow that a peaceful adjustment by contract could be made, although thereby the non-union man was compelled to choose between joining the union and being driven out of his trade or locality.

W. W. S.

TRUSTS—*Cy Pres* DOCTRINE—CHARITIES—ADMINISTRATION BY THE COURT—The doctrine of approximation or *cy pres* has been frequently invoked by the courts in an effort to give effect to the intention of a testator when the scheme of distribution breaks down. The two well-known instances of its application are the cases where a charity has failed in some of its details and where the rule against perpetuities has intervened.

A recent New Hampshire case [1] presented the question as to what was the controlling purpose of the testator under the rule that where the formal intention fails, effect will be given to the substantial intention.[2] Property was devised to a Catholic parish in trust to build a church to be named after the testator, a Protestant. The testator expressed the wish that a tablet of bronze should perpetuate the memory of himself, his wife and family; and the hope that the gift prove "a lasting benefit to the people of the parish for many generations." It was contended that the devise to the parish was void because the rules of the church forbade the naming of a church for a Protestant. The court considered that the property was not given to the parish on condition that it build a church to be known by the testator's name, but in trust to be used for the benefit of the inhabitants. The court in reaching that conclusion cast aside the natural desire of the testator to create a monument to his name and laid hold of the fundamentally charitable purpose, which should have prompted the gift.

A similar conclusion was reached in a case [3] in the same jurisdiction, where a gift was made to establish a hospital in Franklin, to be known as the Proctor Hospital. Owing to the existence of a hospital in that town, it was impracticable to carry out the exact intention of the testatrix. The income was directed to be used in main-

[12] Parkinson Co. v. Bldg. Trades Council, *supra;* Kemp v. Division No. 241, *supra.*

[1] Gagnon v. Wellman, 99 Atl. 786 (N. H. 1917).

[2] Phila. v. Girard, 45 Pa. 27 (1863); Jackson v. Phillips, 96 Mass. 539 (1867).

[3] Adams v. Page, 76 N. H. 96 (1911).

taining a ward in the existing hospital, to be known as the Proctor ward, the court saying, "It is true she says the hospital is to be called the Proctor Hospital, but that has no great tendency to prove that it was a wish to have it known by that name, which induced the bequest. It is more probable that the provision in respect to the name, like that in respect to the trustee's duties was merely a part of her scheme for administering the trust. It cannot be found from such evidence that she intended her heirs should have the property if her scheme for administering the trust ever broke down."

Thus we find the New Hampshire courts exceedingly desirous of approaching the testator's intention. But Chief Justice Doe, in his anxiety to work out the testator's scheme, reached a result calculated to do violence to his plan. A gift had been made to testator's grandchildren when the youngest arrived at the age of forty years. The court made the gift vest when the youngest grandchild reached twenty-one, thus paring down the period of postponement to bring the device within the rule against perpetuities.[4] A more likely interpretation would be that the gift to the testator's grandchildren was designedly postponed until their attaining mature years; and we ask, if the testator had known that the deferred bounty could not vest as presented, would he have chanced the vesting of the property, at a time, when, as he viewed it, the passions and extravagances of youth would dissipate the substance he had collected?

The court, in the principal case,[5] saw by way of *dicta* that in applying the *cy pres* doctrine, it makes no difference whether the plan breaks down because of illegality or changed conditions. This is borne out by the Mormon case,[6] where property devoted to polygamous purposes was decreed to be diverted to different legitimate channels. An excellent illustration[7] of altered circumstances occasioning the application of the doctrine was a bequest of a fund to trustees to erect a church. At the time when testator died the neighborhood was a flourishing one by reason of a racetrack in the vicinity. The racetrack gone, the village stagnated, and there was no hope of a congregation to support the church, if built. The court, approaching the subject as in our principal case, said the general charitable intent was to benefit the Episcopal Church in the neighborhood of the community in question, and applied the fund accordingly.

Where the object of the testator's bounty, though in existence, is incapable of accomplishing the end desired, the fund will be applied *cy pres*. So in the case of a bequest to a hospital, chartered, but not a going concern; another hospital in the same city benefited.[8]

[4] In Edgerly v. Barker, 66 N. H. 434 (1891).

[5] See note 1, *supra*.

[6] Latter Day Saints v. U. S., 136 U. S. 1 (1889).

[7] St. James Church v. Willson, 82 N. J. E. 546 (1913).

[8] Nichols v. Newark Hospital, 71 N. J. E. 130 (1906).

It has been said that no valid reason can be given why the charity should not be administered *cy pres* as well when the scheme breaks down before, as when that does not happen until after the administration begins;[9] but a well-considered New Jersey case[10] flatly decided that charitable legacies lapsed, if at the time of the death of the testator it was impossible to carry the actual intention of the testator into effect. There a bequest to a fund for sick seamen at Brooklyn Navy Yard was not awarded to a seamen's society claiming the fund, when it appeared that there was no fund, and the chaplain supposed to administer it was not living.

In some states[11] statutes exist defining the *cy pres* doctrine, of which the Georgia statute is the clearest statement.[12] In Pennsylvania there is a statute bearing on the subject,[13] but the doctrine was in force prior to its enactment,[14] and has been repeatedly reaffirmed.[15]

The *cy pres* doctrine applies to charities, not every worthy object, so where a statue to the memory of testatrix's husband could not be erected in a certain hall, dedicated to survivors of War of the Rebellion from that county, since he was a native of another state, the trust failed.[16]

C. B. W.

[9] See note 3, *supra.*

[10] Brown v. Condit, 70 N. J. E. 440 (1905).

[11] Ga. Code No. 4604; Conn. Rev. Statutes 1034.

[12] "If the specific mode of execution be for any cause impossible and the charitable intent be still manifest and definite, the court may, by approximation give effect in a manner next most consonant with the specific mode presented."

[13] Act of 1895, P. L. 114: No disposition of property heretofore or hereafter made for any religious, charitable, literary or scientific use shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or *ceasing,* or depending upon the discretion of a last trustee, or being given in perpetuity or in excess of the annual value hereinbefore limited, but it shall be the duty of the orphans' court or court having equity jurisdiction in the proper county to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator so far as same be ascertained and carried into effect consistently with law or equity.

[14] Phila. v. Girard, note 2, *supra;* Lennig's Estate, 31 W. N. C. 234 (Pa. 1892).

[15] Hamilton v. Mercer Home, 228 Pa. 410 (1910); Kramph's Estate, 228 Pa. 455 (1910); Hope's Estate, 253 Pa. 400 (1916).

[16] Davis' Estate, 61 Pitts. Law Journal 560 (Pa. 1913).